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CURRENT TOPICS.

Several of the opinions delivered by Mr. Justice Gray since his accession to the Supreme Bench of the United States, justify the extremely high estimate put upon his qualifications by the advocates for his appointment. While never slighting matters that call for full and elaborate discussion, he has the faculty, rare in modern judges, though not unusually displayed in some of the older cases of delivering an opinion upon really important and universally interesting principles, in terse, precise and brief language. If this practice was more general among judges, not only would the labor and expense of publishing reports be vastly reduced, but the labors of research on the part of the entire bar would be lightened almost to an inestimable degree. The opinion below (which we give entire) in the case of the United States v. Carll, is, we think, a model of this kind. The question was as to the sufficiency, after verdict, of an indictment for passing a counterfeit obligation of the United States, which failed to allege a guilty knowledge on the part of the defendant. The case came up on a certificate of division in opinion between the judges of the circuit court of the United States for the Southern District of New York, and the opinion was as follows: "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent. United States v. Cruikshank, 92 U. S. 542; United States v. Simmons, 96 U. S. 360; Commonwealth v. Clifford, 8 Cush. 215; Commonwealth v. Bean, 11 Cush. 414; Commonwealth v. Bean, 14 Gray, 52; Commonwealth v. Filburn, 119 Mass. 297. The language of the statute on which this indictment is founded includes the case of every person who, with intent to defraud, utters any forged obligation of the United States. But the offense at which it is aimed is similar to the common law offense of uttering a forged or counterfeit bill. In this case, as in that, knowledge that the instrument is forged and counterfeited is essential to make out the crime; and an uttering, with intent to defraud, of an instrument in fact counterfeit, but supposed by the defendant to be genuine, though within the words of the statute, would not be within its meaning and object. This indictment, by omitting the allegation contained in the indictment in United States v. Howell, 11 Wall. 432, and in all approved precedents, that the defendant knew the instrument which he uttered to be false, forged and counterfeit, fails to charge him with any crime. The omission is of matter of substance, and not a "defect or imperfection in matter of form only," within the meaning of sec. 1025 Rev. Stat. By the settled rules of criminal pleading, and the authorities above cited, therefore, the question of the sufficiency of the indictment must be answered in the negative."

No more important case involving the interpretation of constitutional principles has been considered by the Supreme Court of the United States since the famous Dred-Scott decision, and none that is likely to be more permanent and far-reaching in its effects upon our peculiar dual system of government, than the litigation between the States of New York and Louisiana, recently argued but not yet decided. The controversy is the result of a novel and certainly plausible attempt on the part of capitalists in some of the eastern States to collect repudiated State bonds from defaulting State governments. In pursuance of a statute enacted for the purpose by the State of the bondholder, the bonds are assigned to the State, who then, as assignee, brings suit against the defaulting State under the provisions of the Federal Constitution. New York passed such a statute, became the assignee of bonds of the State of Louisiana, held by some of its own citizens, and brought the action in question. The questions in-

volved are tersely and withal fairly stated in argument by the distinguished counsel for the plaintiff Commonwealth, Hon. David Dudley Field, as follows: "1. Can a State of the Union implead another State, in this court, for a money demand? 2. Can it do so, when the demand has been assigned to it by one of its citizens for the purpose of the suit? 3. Can it do so, as the sovereign and trustee of the citizen, without an assignment of his demand? 4. If a suit against the State itself could not be maintained in the case supposed, could the officers of the State of Louisiana, under the circumstances of this case, be required, by the judgment of this court, to apply the money in their hands to the payment of interest on the bonds? 5. And if the money on hand be sufficient to pay the interest now due, can the officers be furthermore directed to go on in the execution of their offices, and assess and collect the taxes required by the Constitution and laws of 1874, and pay the arrears of interest out of the same?" When the case is decided, we shall take pains to give our readers the earliest practicable report, or (if of great length), *resume* of the opinion.

GIFTS CAUSA MORTIS.

Justinian, in describing a *donatio mortis causa*, says that it is "when the donor wishes that the thing given should belong to himself rather than to the person to whom he gives it, and to that person rather than to his own heir."[1] In illustration of which he cites the words which Homer puts into the mouth of Telemachus when the latter gives to Pirœus: "Pirœus, for we know not how these things shall be, whether the proud suitors shall secretly slay me in the palace, and shall divide the goods of my father. I would that thou thyself shouldst have and enjoy these things rather than that any of those men should; but if I shall plant slaughter and death amongst those men, then indeed bear these things to my home, and joying give them to me in joy."

Gifts *causa mortis* have not been generally favored in the law. It is now more than a hundred years since Lord Chancellor Hardwicke declared it to be a pity that the statute for the prevention of frauds and perjuries did not set aside all such gifts.[2] A *donatio mortis causa* was required by the law of Justinian to be made in the presence of five witnesses.[3] But the common law does not require the gift to be executed in the presence of any stated number of witnesses, notwithstanding the fact that such donations amount to a revocation *pro tanto* of written wills.[4] As they lack all those formalities and safeguards which the law, in its wise precaution, throws around wills, it can not be denied that a strong temptation is created to the commission of fraud and perjury. Such gifts are, therefore, said by Chancellor Kent in the note last cited, to be "of a dangerous nature." "Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations," says Lord Chelmsford, present themselves to unscrupulous persons to pretend these death bed donations, that there is always danger of having an entirely fabricated case set up. And, without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."[5] Such gifts are never presumed, and the maxim is applied, *nemo donare facile prae sumitur*. Such gifts "must be established beyond suspicion;"[6] and "where a gift *causa mortis* is alleged, the presumption being against it, clear proof on the part of the claimant is required."[7] And there is no doubt that they have been "a fruitful source of litigation, often bitter, protracted and expensive."[8]

Now, a *donatio mortis causa* is defined to be a conditional gift, depending on the contingency of expected death, and defeasible by revocation, or deliverance from the peril.[9]

[1] Sandars' Justinian (Hammond's ed.), 218.

[2] Ward v. Turner, 2 Ves. 431, 437 (1752).
[3] Sandars' Justinian (Hammond's ed.) 219.
[4] 2 Kent's Com. 444.
[5] Cosnahan v. Grice, 15 Moore P. C. 215, 223.
[6] Grey v. Grey, 47 N. Y. 552, 556.
[7] Conklin v. Conklin, 20 Hun, 278, 280. See, also, Walter v. Hodge, 2 Swans. 97; Contant v. Schuyler, 1 Paige, 316.
[8] Hatch v. Atkinson, 56 Me. 326.
[9] Nicholas v. Adams, 2 Wharton, 17.

And the rule is that in order to render perfect a *donatio mortis causa* three things must concur:[10] 1. The gift must be made with a view to the donor's death. 2. It must be made with a condition, either express or implied, that it shall take effect only on the death of the donor by a disease from which he is then suffering. 3. There must be a delivery of the subject of the donation.

While it is essential that the donor make the gift in his last illness, or in contemplation or expectation of immediate death,[11] yet it is not necessary that it should be made *in extremis* like a nuncupative will.[12] Where a citizen of Tennessee, on leaving his home in Tennessee to enlist in the Federal army in Kentucky, delivered money and notes to be a gift to the donee in case he perished in the war, it was held that the peril and apprehension were sufficiently immediate to justify a gift *causa mortis*.[13] On the other hand, the Supreme Court of New York has held that the delivery of a promissory note, by a person about entering the army, to his brother, with directions to give it to his mother should he not return alive, was not a valid gift to the mother.[14] And where a gift was made in expectation of immediate death from consumption, and the donor afterwards recovered so far as to attend to his ordinary business for eight months, and then finally died from the same disease, the court held that the gift could not be supported as a *donatio mortis causa*.[15] The expectation or apprehension of death may arise from infirmity or old age, or from external and anticipated danger.[16]

That delivery of the gift is essential, is a principle established by a long line of decisions, and disputed by none.[17] But it is not necessary that the delivery should be to the donee personally, it may be made to a third person in his behalf.[18] And instead of delivering the gift to the donee or to a third person in trust for him, the donor may create himself a trustee for the donee. As where money is deposited in bank in the name of the donor as trustee for the donee, and a pass book is received containing an entry that the funds are in trust. In such case there may be a valid gift, although the *cestui que trust* possesses no knowledge of the trust, and although the pass book is in the donor's possession until death.[19] The acceptance of the gift by the donee is also essential in order to make a gift complete or perfect.[20] But acceptance may be presumed in cases where it would be beneficial to the donee.[21] And in general any gift by deed, will, or otherwise, is supposed *prima facie*, unless the contrary appears to be beneficial to the donee.[22] Not only must there be a delivery of the gift, a change of possession, but this change of possession must be continued in the donee, or in

[10] Taylor v. Henry, 48 Md. 550; Murray v. Cannon, 41 Md. 466; Dole v. Lincoln, 31 Me. 422; Smith v. Kittridge, 21 Vt. 238; French v. Raymond, 39 Vt. 623; Blanchard v. Sheldon, 16 Vt. 266; Raymond v. Sellick, 10 Conn. 484.

[11] Lawson v. Lawson, 1 P. W. 441; Miller v. Miller, 3 P. W. 358; Blount v. Burrows, 1 Vesey, Jr. 546; Cosnahan v. Grice, 15 Moore P. C. 215, 222; Grattan v. Appleton, 3 Story C. C. 755; Gourley v. Linzbigler, 51 Pa. St. 345; Rhodes v. Childs, 64 Pa. St. 18; Robinson v. Ring, 72 Me. 144; Case v. Dennison, 9 R. I. 88; Gass v. Simpson, 4 Coldw. (Tenn.) 288; Chaplin v. Seeber, 56 How. Pr. (N. Y.) 46; Irish v. Nutting, 47 Barb. (N. Y.) 370; Sheldon v. Button, 5 Hun, (N. Y.) 110; Merchant v. Merchant, 2 Bradf. (N. Y.) 432; Barker v. Barker, 2 Gratt. (Va.) 344; Sheegog v. Perkins, 4 Baxter (Tenn.), 273; Knott v. Hogan, 4 Met. (Ky.) 101.

[12] Nicholas v. Adams, 2 Wharton (Penn.), 17; Gass v. Simpson, 4 Coldw. (Tenn.) 288.

[13] Gass v. Simpson, *supra*.

[14] Sheldon v. Button, 5 Hun. 110.

[15] Weston v. Hight, 17 Me. 289.

[16] Dig. 39, 6, sec. 3, 4, 5, 6; 2 Kent's Com., 444.

[17] Ward v. Turner, 2 Vesey, 431; Tate v. Hilbert, 2 Vesey, Jr. 111; Bunn v. Markham, 7 Taunton, 224; Powell v. Hellicar. 26 Beavan, 261; Gough v. Tindon, 8 E. L. & Eq. 507; Drury v. Smith, 1 P. W. 404; Resch v. Senn, 28 Wis. 286; Carpenter v. Dodge, 20 Vt. 595; Frost v. Frost, 33 Vt. 639; Turner v. Brown, 6 Hun, 333; Cox v. Sprigg, 6 Md. 274; Powell v. Leonhard, 9 Fla. 359; Case v. Dennison, 9 R. I. 88; Egerton v. Egerton, 2 C. E. Green, 419; Dow v Gould, etc. Man. Co., 31 Cal. 629; Smith v. Wiggins, 3 Stew. (Ala.) 221; Singleton v. Cotton, 23 Ga. 261; McKenzie v. Downing, 25 Ga.669; Hatch v. Atkinson, 56 Me. 324; Young v. Young, 80 N. Y. 422; Brown v. Brown, 18 Conn. 414, 417; Phipps v. Hope, 16 Ohio St. 586; Craig v. Craig, 3 Barb. Ch. 76; Champlin v. Seeber, 56 How. Pr. 46; Waring v. Edmonds, 11 Md. 424; People v. Johnson, 14 Ill. 342; Withers v. Weaver, 10 Barr, 391.

[18] Drury v. Smith, 1 P. W. 404: Caldwell v. Renfrew, 33 Vt. 213; Jones v. Dever, 16 Ala. 221; McGillicuddy v. Cook, 5 Blackf. 178; Michener v. Dale, 23 Pa. St. 59; Gourley v. Linsenbigler, 51 Pa. St. 345; Wells v. Tucker, 5 Binney, 366; Grymes v. Hone, 49 N. Y. 17; Borneman v. Sidlinger, 15 Me. 429, 431; Dole v. Lincoln, 31 Me. 422; Waring v. Edmonds, 11 Md. 424; Gass v. Simpson, 4 Coldw. (Tenn.) 288.

[19] Martin v. Funk, 75 N. Y. 134, and the cases there cited.

[20] Delmotte v. Taylor, 1 Redf. 417; Dow v. Gould, etc. Manuf. Co., 31 Cal. 629; DeLevellain v. Evans, 39 Cal. 120; Armitage v. Widoe, 36 Mich. 124.

[21] Goss v. Singleton, 2 Head (Tenn.), 67; DeLevellain v. Evans, 39 Cal. 120; Higman v. Stewart, 38 Mich. 513, 524; Darland v. Taylor, 52 Iowa, 503.

[22] Gos sv. Singleton, 2 Head (Tenn.), 67.

a third person for him, until the donor's death.[23]

Although a difference of opinion at one time existed as to what could be the subject of a gift *causa mortis*, the principles determining the question are now well settled. A *donatio causa mortis* extends only to personalty, and a gift of real estate can not be sustained as such a gift.[24] In Pennsylvania the courts have held that the gift of all a person's property to take effect after death, was not a valid *donatio causa mortis*, that a gift *causa mortis* could not thus be made to operate as a will,[25] though the same court, in a subsequent case, has held that the rule is otherwise as to a particular chattel, although such chattel may have constituted the principal part of the donor's property.[26] But it has been held in Vermont that there is no principle of limitation as to the amount of property which may be transferred by a *donatio causa mortis*, and it was held a valid gift where the donor, on his death bed, executed a deed of all his personal property to his wife.[27] It was formerly held that a mere chose in action did not pass by delivery, and could not take effect as a gift *causa mortis*.[28] But such is no longer the rule, and it is well settled that a promissory note made by a third person, and payable to the order of the donor, or a bill of exchange may be a valid gift *causa mortis*.[29] But the donor's own promissory note is not the subject of such a gift.[30] Such a note is a mere promise of the donor, and can no more be recovered upon as a gift, than could a recovery be had upon the unwritten promise of the donor. Such notes "are of no more value than blank paper," for a mere intention or naked promise to give is not a gift, and a court of equity will not interfere and give effect to a gift left inchoate and imperfect.[31] And if the promissory note of a third person be given *causa mortis*, and be secured by a mortgage, the mortgage will enure solely to the benefit of the donee, although the mortgage deed was not delivered with the note, or even alluded to at the time of the delivery of the note, but continued to remain in the donor's possession until his death.[32] It is also settled that it is entirely unnecessary that the note should be indorsed in order to pass the title.[33] So a bond may be given without any written assigment.[34] And the delivery of a certificate of deposit on a life insurance company has been held to be effectual, without a written assignment, to transfer the deposit itself to the donee, as a gift *causa mortis*.[35] A deposit in a savings bank may be the subject of a valid gift *causa mortis*, and such gift may be proved by the delivery of the bank or pass book to the donee, accompanied by an assignment;[36] or it may be proved by the simple delivery of the pass book, without any assignment.[37] It has been held that the delivery of a banker's deposit note may be a good gift *causa mortis*.[38] In Curry v. Powers, recently decided in the New York Court of Appeals, it was held that the delivery of a check upon a savings bank, payable four days after the death of the drawer, together with the pass book of the depositor, did not

[23] Hatch v. Atkinson, 56 Me. 324; Jones v. Deyer, 16 Ala. 221.

[24] Meach v. Meach, 24 Vt. 591; Gilmore v. Whitesides, Dudley (S. C.), 13.

[25] Headley v. Kirby, 18 Pa. St. 326.

[26] Michener v. Dale, 23 Pa. St. 59.

[27] Meach v. Meach, 24 Vt. 591.

[28] Miller v. Miller, 3 P. W. 358; Bradley v. Hunt, 5 Gill & J. 54.

[29] Austin v. Mead, 15 L. R. Ch. Div. 651; Veal v. Veal, 27 Beavan, 303; Rankin v. Weguelin, Id. 309, Caldwell v. Renfrew, 33 Vt. 213; McConnell v. McConnell, 11 Vt. 290; Turpin v. Thompson, 2 Metc. (Ky.) 421; Brown v. Brown, 18 Conn. 414, 417; Borneman v. Sidlinger, 15 Me. 429; Wing v. Merchant, 57 Me. 383; Grover v. Grover, 24 Pick. 261; Bates v. Kempton, 7 Gray, 382; Parker v. Marston, 27 Me. 196; Contant v. Schuyler, 1 Paige, 316; Harris v. Clark, 2 Barb. 94; s. c., 3 N. Y. 93; Champney v. Blanchard, 39 N. Y. 111.

[30] Blanchard v. Williams, 70 Ill. 647, 652; Parish v. Stone, 14 Pick. 198; Priester v. Priester, Rich. Eq. Cas. 26; Brown v. Moore, 3 Head (Tenn.), 671; Raymond v. Sellick, 10 Conn. 484; Smith v. Kitttidge, 21 Vt. 238; Voorhees v. Woodhull, 33 N. J. Law, 494, 498; Smith v. Smith, 30 N. J. Eq. 562; Haymore v. Moore, 8 Ohio St. 239; Starr v. Starr, 9 Ohio St. 74; Craig v. Craig, 3 Barb. Ch. 76; Harris v. Clark, 3 N. Y. 93; Dodge v. Pond, 23 N. Y. 69; s. c., 28 Barb. 121.

[31] 2 Kent's Com., 338; Antrobus v. Smith, 12 Ves. 39; Pennington v. Gittings, 2 Gill & J. 208.

[32] Brown v. Brown, 18 Conn. 414, 417.

[33] See the cases cited in note 29.

[34] Waring v. Edwards, 11 Md. 424; Walsh v. Sexton, 55 Barb. 251; Duffield v. Elwes, 27 Beavan, 399.

[35] Waterloo v. DeWitt, 36 N. Y. 340.

[36] Kingman v. Perkins, 105 Mass. 111; Foss v. Lowell Five Cents Savings Bank, 111 Mass. 285. Sheedy v. Roach, 124 Mass. 472; Davis v. Ney, 125 Mass. 590.

[37] Pierce v. Boston Five Cents Savings Bank, 129 Mass. 425; Turner v. Boston, etc. Savings Bank, Ib. 425; Hill v. Stevenson, 63 Me. 364; Tillinghast v. Wheaton, 8 R. I. 536; Camp's Appeal, 36 Conn. 88; Penfield v. Thayer, 2 E. D. Smith, 305.

[38] Amis v. Witt, 33 Beavan, 619; Moore v. Moore, L. R. 18 Eq. 474; Brooks v. Brooks, 12 S. C. (N. S.) 424.

amount to a valid gift *causa mortis*.[39] And in the English case of Hewitt v. Kaye,[40] where a check given by the drawer was not presented for payment until after the death of the donor, it was held not to amount to a good *donatio mortis causa*. But in Rolls v. Pearce, where a check was drawn by a donor payable to his wife or her order, and was given to him by her shortly before his death, was indorsed by her and paid into a foreign bank against the amount of which she drew, the court held it to be a good *donatio mortis causa*, although the check was not presented for payment at the bank on which it was drawn till after the death of the donor.[41] The delivery of a bill of exchange payable to the donor or order, and which did not fall due until after he died, has been held a gift *causa mortis*.[42]

A distinction, therefore, exists as to checks, and the principle is, that although the drawer of the check may deliver it to the payer, intending thereby to give to the donee the fund on which the check was drawn, that, nevertheless, until the check has been paid or accepted the gift is incomplete, and that, in the absence of either payment or acceptance, the death of the drawer operates as a revocation of the gift.[43] The rule then, is, that personal chattels, bonds or choses in action, may be the subject of disposal as gifts, either *inter vivos* or *causa mortis*,[44] but that a donor's own promissory note can not be so disposed of, and that a check which he has drawn and given to the payee, must be either paid or accepted before the donor's death, to make the gift valid and complete. While personal property is thus the subject of gifts *causa mortis*, as above stated, yet the rule is that the only property which can thus be disposed of, is the balance left after the payment of all debts. Or, in other words, the donee takes the property, subject to the right of the administrator to reclaim it, if required for the payment of the debts of the donor,[45] but not to the claims of legatees.[46] So, by the civil law, such gifts were liable to debts. If the donor was insolvent at the time of his death, this was considered an implied revocation of the gift.[47]

We have stated that delivery is essential to complete a gift *causa mortis*. It remains, however, to direct attention to what is a sufficient delivery of the property, which is the subject of the gift, to satisfy the requirements of the law upon this branch of the subject. For while the maxim "*donatio perficitur possessione accipientis*" is an ancient one in the law, it has not always been easy to determine what is a sufficient possession of the property to perfect the title of the donee. This question of delivery was elaborately considered and learnedly discussed by Lord Chancellor Hardwicke in Ward v. Turner,[48] in the year 1752. In the course of the opinion announced by the chancellor, he said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of any thing by way of symbol is sufficient; but I can not agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this court delivery of the thing given is relied on, and not in the name of the thing." While thus holding that delivery should be actual and not symbolical, he adds that "delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do." The point actually decided was, that the delivery of receipts for certain South Sea annuities did not amount to a delivery of the annuities. Subsequently this subject was discussed, and with marked learning, in Tate v. Hilbert,[49] when Lord Loughborough again urged the necessity of actual delivery to the efficacy of gifts

39 70 N. Y., 212.
40 L. R., 6 Eq., 198.
41 L. R. 5 Ch. Div. 730.
42 Austin v. Mead, L. R. 15 Ch. Div. 651.
43 Second National Bank v. Williams, 13 Mich. 282; Simmons v. Savings Society, 31 Ohio St. 457.
44 Blanchard v. Williams, 70 Ill. 647, 652.
45 Pierce v. Boston Savings Bank, 129 Mass. 425, 433; Mitchell v. Pease, 7 Cush 350; Chase v. Redding, 13 Gray, 418; McLean v. Weeks, 67 Me. 277; s. c., 65 Me. 411; Gaunt v. Tucker, 18 Ala. 27; Borneman v. Sidlinger, 15 Me. 429, 431; House v. Grant, 4 Lans. 296.
46 Gaunt v. Tucker, 88 Ala. 27.
47 Sandars' Justinian (Hammond's ed.) 219.
48 2 Vesey, 431, 443.
49 2 Vesey Jr. 111.

of this nature, unless the transfer was perfected by means of a deed or written instrument. He decided that where a person, in his last sickness, gave his check on his banker for a sum of money, and died before the check was paid, it was not a good gift *causa mortis*, and that where the same person, at the same time, gave his own promissory note for a sum of money to another donee, that it was not good as such a gift, inasmuch as it was no transfer of property. It is settled that there must be such a delivery as comports with the nature of the subject matter.[50] The delivery should be *secundum subjectam materiam*. It should "be the true and effectual way of obtaining the command and dominion of the subject."[51] The rule is well stated in a case decided in Virginia, where it is said: "A delivery is indispensable to the validity of a *donatio mortis causa*. It must be an actual delivery of the thing itself, as of a watch or a ring; or of the means of getting the possession and enjoyment of the thing, as of the key of a trunk or a warehouse in which the subject of the gift is deposited; or if the thing be in action of the instrument by using which, the chose is to be reduced into possession, as a bond, or a receipt, or the like."[52] The fact that the property is out of reach of the would-be donor, so that delivery is impossible, is entirely immaterial, the gift can not be sustained in the absence of a delivery, whether delivery is possible or not.[53] In illustration of the principles discussed, a reference to a few of the cases may not be out of place. In Hatch v. Atkinson,[54] the court held that the delivery of a key of a trunk containing money and government bonds, was not a valid delivery of the money and bonds. "Although delivery of the key of a warehouse, or other place or deposit," said the court, "where cumbrous articles are kept, may constitute a sufficient constructive or symbolical delivery of such articles, it is well settled that delivery of the key of a trunk, chest or box, in which valuable articles are kept, which are capable of being taken into the hand, and may be delivered by being passed from hand to hand, is not a valid delivery of such articles. The rule is that the delivery must be as perfect and complete as the nature of the articles will admit of. While a constructive delivery may be sufficient for large or cumbrous articles, it will not be sufficient for small articles, capable of a more perfect and complete delivery." In Bunn v. Markham,[55] the would-be donor had certain bonds and notes brought out of his chest and laid on his bed. He then caused them to be sealed up in packages, the amount of the contents written on them, with a statement "for Mrs. C," "for Miss C." This being done, he directed that they should be returned to the chest, that the chest should be locked, the keys sealed up, and the keys to be delivered to one J after his decease. The gift was invalid for want of delivery. In Powell v. Hellicar,[56] the donor told one A to take the keys of his dressing case and box, containing her watch and trinkets, and immediately on her death to deliver the watch and trinkets to the plaintiff. A acted accordingly, but it was held that the gift was incomplete for want of delivery. But in Smith v. Smith,[57] it was ruled that the delivery of the key of a room containing furniture was such a delivery of possession of the furniture as to render a gift *causa mortis* valid. Other cases may be referred to,[58] but those cited plainly illustrate the necessity of delivering the thing itself in all cases when the nature of the thing admits of such a delivery. Upon this question of delivery, and of delivery as distinguished from possession, we quote as follows: "It is not the possession of the donee, but the delivery to him by the donor, which is material in a *donatio mortis causa*; the delivery stands in the place of nuncupation, and must accompany and form a part of the gift; an after acquired possession of the donee is nothing; and a previous and continuing possession, though by the authority of the donor, is no better. The donee, by being the debtor or

[50] Turner v. Brown, 6 Hun, (N. Y.) 333; Hitch v. Davis, 3 Md. Ch. 266; Brown v. Brown, 18 Conn. 414; Pope v. Randolph, 13 Ala. 214; Carridine v. Collins, 7 S. & M. 428; Blakey v. Blakey, 9 Ala. 391; Hillebrant v. Brewer, 6 Tex. 45; Powell v. Leonard, 9 Fla. 359.

[51] 2 Kent's Com., 439.

[52] Miller v. Jeffress, 4 Gratt. 479.

[53] Case v. Dennison, 9 R. I. 88.

[54] 56 Me. 324.

[55] 7 Taunton, 223.

[56] 26 Beavan, 261.

[57] Str. 955.

[58] Jones v. Shelby, Chan. Prec. 300; Faryuharson v. Cave, 2 Colby, 356; Cooper v. Burr, 45 Barb. 9; Reddel v. Dobree, 10 Sim. 246.

bailee or trustee of the donor, in regard to the subject of the gift, stands upon no better footing than if the debt or duty were owing from a third person. A debt or duty can not be released by mere parol, without consideration; and where there is nothing to surrender by delivery, the only result is, that in such a case, there can not be a *donatio mortis causa*; and a release, without valuable consideration therefor, must be by testament, or by some instrument of writing which would be effectual for the purpose *inter vivos*."[59]

It remains for us to notice that it has been that until death the title to the subject of the gift remains in the donor, and vests in donee only at time of donor's death, having relation back to the time of delivery.[60] Is it not more correct to say that the title passes to the donee at the time of delivery, and that the title thus obtained is defeasible only on the recovery of the donor, or on his express revocation? While a gift *inter vivos*, having been perfected by delivery is irrevocable,[61] a gift *causa mortis* may be revoked at any time before the donor's death.[62]

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[59] Miller v. Jeffress, 4 Gratt. (Va.) 480; and see French v. Raymond, 39 Vt. 624.
[60] Gass v. Simpson, 4 Coldw. (Tenn.) 288.
[61] 2 Kent's Com., 440.
[62] Ib., 447.

PRESUMPTIONS OF LIFE, DEATH, AND SURVIVORSHIP.

V.

We have been egregiously taken aback by a discovery, made too late, indeed, but fortunately while yet there was an opportunity for manifesting regret; so that, at all events, we are better circumstanced than the good people of Devon, who, in days when it was difficult for even ill news to travel fast, only learned the death of Queen Elizabeth after the period of court mourning, too, had expired. It happens that, so resolved were we to investigate the subject in hand with entire independence (a characteristic of our papers in general, that the mere cursory reader may fail to realize), we announced, at the outset, a determination not to consult the "elaborate note" to Nepean v. Doe, in Smith's Leading Cases—something, forsooth, we might find to say that was not there forestalled—yet were we diffident, and apprised the reader that there he would acquire every additional information to supplement our shortcomings. Who, indeed, but would have expected to find there an exhaustive annotation on the subject? Well, having now concluded our own researches and discussion as to presumptions of life and death (as to which, *cf.*, also, the New York Code), we have ventured, at last, not without trepidation, to try and discover our deficiencies by exploring the "elaborate note." Nepean v. Doe begins at page 584 of the last edition, and from page to page we proceeded till we arrived at 703. So climbs the traveler the imposing stone stairways at Persepolis—they lead to nothing; and alike illusory was our exploration. In fact, as we regretted to discover, the "elaborate note" devotes to the subject only a few lines of a single page; and the feast of logic and the flow of law, so confidingly anticipated, proved as vain as the viands of Eon, the Sorcerer of Britany. If, then, our discussion of presumptions of life and death has been somewhat protracted, the result is a monograph that may be found of practical utility in reference to a subject so often arising, as to which we have mentioned no less than four Irish cases (two of them before the Land Commission) occurring within the last month; and there is the less reason to apologize for not terminating before, but rather, as we do, like the miller, shutting the gates when the grist is out. The remaining clause of our theme relates to presumptions of survivorship; and here, too, we shall have to note in other systems of jurisprudence some suggestive differences from our own, while curious and interesting indeed have been many of the cases in which the question was involved. But this is a branch of the matter that has elsewhere received considerable attention, so that there is less reason for treatment so extensive as its wide scope would allow; and we shall but say, with Montesquieu, when he begins to treat of commerce, "the subject which follows would require to be discussed more at large, but the nature of this work does not permit it. I wish to glide on a tranquil stream, but I am hurried along by a torrent."

Last December, we learned that a case was about to come before a Marseilles tribunal

arising out of the following circumstances: M. Rivoire, a resident of Marseilles, was, with his wife, rowing outside the harbor; their boat was capsized by the swell of a passing steamer; both were precipitated into the water, and both were drowned. The wife having made a will in favor of her husband, if it could be established that she had been the first to die, the property would go to his heirs. If, on the other hand, she survived, her next of kin would be entitled to the real and personal estate. Now, here direct proof as to which was the survivor could not, of course, be had. As to indirect proof, on the one hand, it might be contended that the man, being stronger and more robust, was likely to have made a harder fight for life, clinging to the boat, perhaps, and swimming as long as his strength held out, while the woman, being the weaker, made less effectual and less prolonged efforts, and succumbed to fatigue and despair at an earlier period than her husband; and, on the other hand, in favor of the belief that Madame Rivoire survived the longer, it might be urged that she was, all things considered, more buoyant, that her dress was likely to help greatly in keeping her afloat, and that, in all probability, the husband had exhausted himself in efforts to save her before he sank to rise no more. But in cases like this, in the absence of more authentic testimony, obviously, nothing but a statutable enactment could settle the question beyond possibility of doubt or cavil; and the Code Napoleon legislates for this difficulty.[1] Under it, if several persons respectively entitled to inheritance from one another happen to perish by the same event, such as a wreck, a battle or a conflagration, without any possibility of ascertaining who died first, the presumption of survivorship is determined by the circumstances of the fact. But in the absence, as interpreted, (1) of material facts, resulting from the appearance of the body, examined by physicians, (2) of the testimony of persons who witnessed the event, and (3) circumstances of fact, certain presumptions are created and resorted to. As originally framed, the Code (art. 720), declared that, when it could not be ascertained who died first, the age and sex of the parties should guide the judges in their decision; to which Consul Cambaceres objected as too absolute.[2] And as now modified, it is declared that, in the absence of circumstances of the fact, the determination must be decided by the probabilities resulting from the age, strength and difference of sex, according to the following rules: If those who have perished together were under the age of fifteen years, the eldest shall be presumed to have survived; if all were above the age of sixty years, the youngest shall be presumed to have survived; if some were under fifteen and some above sixty, the first shall be presumed to have survived; if those who have perished together were above the age of fiteen and under sixty, the male must be presumed to have survived, where there was an equality of age or a difference of less than one year; if they were of the same sex, the presumption of survivorship, by which the succession becomes open in the order of nature, must be admitted—thus, the younger must be presumed to have survived the older. As to how the Code Civil has been construed, we shall but refer our readers to its commentators, Marcade, Demolombe, etc.; and in Merlin may be found an exhaustive *resume* of the French decisions from the earliest period to the present time. In deciding cases arising out of the Massacre of the Huguenots, on St. Bartholomew's Day, it seems the Parliament of Paris acted on the presumption that the murder of the older persons preceded that of the younger, believing that those who were capable of offering resistance would have been first assassinated;[3] and so, in the case of the murder of the daughter of the celebrated Dumoulin with her two children, it was presumed that the robbers first slaughtered the mother.[4] In the State of Louisiana the provisions of the Code Civil have been adopted in terms.[5] And to a certain extent analogous were the rules of the Roman law, as to which Covarruvias, Cujas, Bartolus and Menochius should be consulted. Thus, "Cum bello pater cum filio periisset, materque filii quasi postea mortua bona vindicaret, agnati vero patris quasi filius antea perisset. Divus

[1] Arts. 720, 721, 722.

[2] 2 *Motifs et Discours du Code Civil*, 321, ed. 1838.

[3] Stryk. Diss. 10, c. 6, No. 11.

[4] *Pothier, Traite de Suexes*, c. 3, s. 1.

[5] Civil Code of Louisiana, secs. 930-939; see Gallier's Case, admirably annotated in 2 South. L. Rev. (N. S.), 594.

Hadrianus credidit, patrem prius esse mortuum."[6] And again, "Mulier naufragio cum anniculo filio periit quia verisimile videbatur, ante matrem infantum perisse, virum partem dotis retinere placuit."[7] In Italy and Spain the doctrines of the Roman law and its commentators are adopted with some modifications. But, principles more resembling the English appear to prevail in the German and Scandinavian States. So, by the Civil Code of Holland,[8] in the absence of evidence, the presumption is that all persons who perish together die at the same moment, and that there is transmission or succession from one in favor of the other. So, in Prussia, it is provided that where two or more persons lose their lives in a common calamity, in such a way that it can not be ascertained which has survived, it is to be assumed that neither has survived the others.[9] And so, by the Mahometan law of India, where relatives perish together, it is presumed that they all died at the same moment, and the property of each passes to his heirs, without any portion of it vesting in his companions in misfortune.[10]

At one time in England it was said that, where several persons have perished in the same catastrophe, the presumption was in favor of the survival of the stronger person,[11] And again, many cases are to be found seeming to support the position that simultaneous death is to be presumed.[12] But, it must now be taken as the law that there is no artificial presumption in cases of this nature, either that any one in particular survived or that all died at the same time; and it will merely be considered, in the absence of evidence to the contrary, that one of them survived, leaving it to be discovered from the evidence who was the individual survivor. The question is one of fact, depending wholly on evidence; the real or supposed superior strength (as from age or sex) of any of the persons perishing by a common calamity being left merely to carry its natural weight — *i. e.*, as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof. The *onus probandi* is on the person who claims derivatively through a survivorship of one out of several, to prove the fact affirmatively; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. Such, so far as we can gather, are the net principles to be evolved from the current of authority, both in this country and the United States.[13]

In addition to those authorities (not elsewhere so fully collected), there is another class of cases that might be mentioned, such as Pennefather v. Pennefather,[14] where, it appearing that a son, first tenant in tail in remainder, left this country on the 11th of April, 1858, and was never heard of afterwards, and that his father, tenant for life, died on the 8th of May, 1858, it was held, in 1872, that it should be presumed that the son survived the father. Again, in Stewart's Trustees v. Stewart,[15] it appeared that Patrick Stewart had gone to America in 1860, leaving his wife and children in Scotland. He had communicated by letter for a year, and then enlisted in the Federal army, but deserted in 1862, after which, notwithstanding full inquiry, nothing was heard of him. The questions were, Was

[6] L. 9. s. 1. ff. de reb. dub.
[7] L. 26, ff. de pac. dot.
[8] sec. 878.
[9] Pa. Allg. Landrecht, Th. 1, tit. 1, sec. 39.
[10] Baillie's Law of Inheritance, 172.
[11] Sillick v. Booth, 1 Y. & Col. 117; Mochring v. Mitchell, 1 Barb. Ch. 270; 1 Phil. Ev. 449.
[12] Wright v. Samada, 2 Salk. 593; R v. Heuss, 2 Salk. 533; 5 B. & Ad. 91; *Re* Goods of Selwyn, 3 Hagg. Ec. R. 748; Taylor v. Diplock, 2 Phillim. 261; Satterthwaite v. Powell, 1 Curt. 705.
[13] Broughton v. Randall, Cro. Eliz. 503; R v. Hay, 1 W. Bl.640;4 Burr. 2295 (see 2 Phillim. 261,n); Hitchcock v. Beardsley, West. R. t. Hardw. 445; Taylor v. Diplock, 2 Phillim. 261:Wright v.Netherwood,2 Ib. 266; 2 Salk. 573; Mason v. Mason, 1 Meriv. 308; Colvin v. H. M. Procurator-Gen., 1 Hagg. N. S. 92; Goods of Selwyn, 3 Ib. 748; Goods of Murray, 1 Curt. 596; Satterthwaite v. Powell, Ib. 705; Sillick v. Booth, 1 Y. & C. C. C. 117; Durrant v. Friend, 5 De G. & S. 343; Goods of Wainwright, 1 Sw. & Tr. 257; 28 L. J. P. 2; Goods of Ewart, 1 Sw. & Tr. 258; Goods of Nichols, L. R. 2 P. & D. 361; 41 L. J. P. & M. 88; Goods of Wheeler, 37 L. J. P. & M. 40; Dowley v. Winfield, 14 Sim. 277; *In re* Phene's Trusts, L. R. 6 Ch. 145; Scrutton v. Pattillo, L. R. 19 Eq. 269; Underwood v. Wing, 4 De G. M. & G. 633; 19 Beav. 439; Wing v. Angrave, 8 H. L. C. 183; Wollaston v. Berkeley, 2 Ch. Div. 213; Pell v. Ball. 1 Cheves Ch. Cas. 99; Coye v. Leach, 8 Met. 371; Mochring v. Mitchell, 1 Barb. Ch. 269; Smith v. Croom, 7 Fla. 144; Newel v. Nichols, 75 N. Y. 78; 12 Hun. 604; 17 Am. L. Reg. 249; *In re* Hall, 12 Ch. L. N. 68; Robinson v. Gallier, 2 Wood C. C. 178; 2 So. L. R. 594; and see Best on Ev., 6th ed. 527; 1 Tay. on Ev. 7th ed. 209; 1 Tay. Med. Jur., 2d ed. 168; Wharton and Stille's Med. Jur.; Guy's Med. Jur.; 1 Beck. Med. Jur.; 1 Greenl. Ev.; 2 Kent's Com. 435.
[14] Ir. R. 6 Eq. 171.
[15] 2 Rettie, 488.

he dead? and if so, did he predecease a testator who had died in 1872, and under whose will he succeeded to a share of the estate sought to be distributed? It was held, in 1875, that neither his death nor his survivance could be presumed, and that the distribution of his portion of the fund in dispute should be postponed. But, the class of cases to which it is more especially our present purpose to refer, relate rather to *commorientes* (a term, by the way, which we do not find defined in the Law Dictionaries, from Tomlin, to Brown, 4th ed., or down to the Student's Pocket Lexicon just published), where, in consequence of the seemingly synchronal deaths of different persons, perishing it may be in a common disaster, the question of presumption of survivorship has more frequently arisen.

Were we to enter into the reported details of such cases, we should have indeed to speak, like Othello,

> "of most disastrous chances,
> Of moving accidents, by flood and field,"

while the railway would be added by Goods of Wheeler and *Re* Hall, the Cawnpore massacre would render Goods of Wainwright "wondrous pitiful," the case of General Stanwix (on which Fearne composed two ingenious counter arguments),[16] would introduce us to a shipwreck on a journey from Dublin to England, at a period twenty years before such a journey was described, in Robert's "Social History of the Southern Counties," as having cost £114. 3s. 4d., and a reference to Croke Eliz. would disclose the consequences of hanging a father and son in the same cart, and the legal result of the son appearing, by shaking his legs, to struggle the longer. But, in such cases, the difference can only be a few brief seconds, on which hangs the title to estates; and as observed in *Re* Hall[17] (arising out of the Ashtabula Bridge catastrophe in 1876), "the scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether, during the momentary life struggle, one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence, in the absence of other evidence, the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time." And though Mr. Starkie[18] maintains that in such cases a general rule is preferable to laborious investigation in each individual case, when the result must always be subject to doubt and uncertainty, while the conclusion arrived at, after a careful examination of the subject, in Beck's Medical Jurisprudence,[19] is that the provisions of the French code, with some modifications, appear to be best adapted for administering equitably the majority of cases that may occur, we rather hold, with the court in *Re* Hall, that nothing can be more uncertain or unsatisfactory than this conjectural mode of arriving at a fact, which, from its very nature, must remain uncertain. "It would seem to be unsafe," observes Van Vorst, J., in Newell v. Ridgway, "to rely upon any presumption arising either from age or sex with regard to survivorship of persons exposed to a common peril by the sinking of a ship. It is true, that one might by strength and powers of endurance survive the other, but the strongest might perish first. Experience in such cases shows that no rule can be unalterably adopted to determine survivorship." "I give the medical gentlemen," observed Lord Cranworth, in Underwood v. Wing, "entire credit for speaking scientifically, and, as they believed, quite accurately (though I do not think that they themselves are very confident on the subject); but to take what they say, calculating and reasoning *a priori*, for that is all it comes to, as to which of the two persons may have breathed a few seconds the longer at the bottom of the sea, as establishing the fact, seems to me to be quite misunderstanding human testimony. I am utterly unconvinced that they can tell us which of those two persons died first, even supposing them to be taken and quietly submerged to the bottom of the sea." And we quite agree with Mr. Schmidt that the opinion of the chancellor appears not only more reasonable, but more conformable to the principles of the medical science, than that of Dr. Taylor. Asphyxia by submersion exhibits a great variety of phenomena, for some-

[16] Posth. Works, 38 (Fearne).
[17] 12 Ch. L. N. 68.
[18] 2 Ev., 929, n., 3d ed.
[19] C. 10, 642, 12th ed.

times a feeble child is resuscitated after having been submerged for some minutes, while there is no possibility of restoring the father immersed at the same time, though incomparably more healthy and stronger.[20] Yet, in such cases the civil law, the French code, and their congeners would presume to generalize and lay down artificial dogmas. Wiser it is, with our common law, to discard such theories, founded, at best, on conjectures which are rarely, if ever, capable of verification; and better it is, where the devolution of estates is involved, that the whole circumstance of each case should be submitted to examination, and the medical testimony be taken for just whatever it is worth, no matter how long and laborious may be the investigation.

Somewhat laborious has been our investigation, too, though perhaps not worth much; and long, too, it has extended, possibly for Pascal's reason, "je n'ai fait celle-ci plus longue que parce que je n'as pas eu le loisir de la faire plus courte," or, as Mr. Fox put it, after making a long speech, "if I had more time, I should have been shorter." But if any reader's patience has survived till now, that is our reward—his, be the fruits of our study.—*Irish Law Times.*

[20] See Traite d'Asphyxie par Docteur Marc, Medecin du Roi, etc., Paris, 1846.

BILL OF LADING — NEGOTIABILITY — ISSUED BY AGENT WITHOUT AUTHORITY —INNOCENT HOLDER FOR VALUE.

POLLARD v. VINTON.

Supreme Court of the United States, October Term, 1881.

1. The legal character and effect of a bill of lading stated in reference to its negotiable quality.

2. Neither the master of a vessel nor the shipping agents of steamboats on the rivers of the interior, at points where they receive and deliver cargo, have authority to bind the vessel or its owners by giving a bill of lading for goods or cargo not received for shipment.

3. Such a bill of lading, being outside of the power conferred by the agents' authority, is void in the hands of a person who may have afterwards in good faith taken it and advanced money on it.

In error to the Circuit Court of the United States for the District of Kentucky.

Mr. Justice MILLER delivered the opinion of the court:

The defendant in error, who was also defendant below, was the owner of a steamboat running between the cities of Memphis, on the Mississippi River, and Cincinnati, on the Ohio River, and is sued on a bill of lading for the non-delivery at Cincinnati of one hundred and fifty bales of cotton, according to its terms. The bill of lading was in the usual form, and signed by E. D. Cobb & Co., who were the general agents of Vinton for shipping purposes at Memphis, and was delivered to Dickinson, Williams & Co., at that place. They immediately drew a draft on the plaintiffs in New York, payable at sight, for $5,900, to which they attached the bill of lading, which draft was duly accepted and paid. No cotton was shipped on the steamboat, or delivered at its wharf or to its agents for shipment, as stated in the bill of lading, the statement to that effect being untrue.

These facts being undisputed, as they are found in the bill of exceptions, the court instructed the jury to find a verdict for the defendant, which was done, and judgment rendered accordingly. This instruction is the error complained of by the plaintiffs.

A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchases only applies to it in a limited sense. It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver. To these elementary truths the reply is that the agent of defendant has acknowledged in writing the receipt of the goods, and promised for him that they should be safely delivered, and that the principal can not repudiate the act of his agent in this matter, because it was within the scope of his employment. It will probably be conceded that the effect of the bill of lading and its binding force on the defendant is no stronger than if signed by himself as master of his own vessel. In such case we think the proposition can not be successfully disputed that the person to whom such a bill of lading was first delivered can not

hold the signer responsible for goods not received by the carrier.

Counsel for plaintiffs, however, say that in the hands of subsequent holders of such a bill of lading, who have paid value for it in good faith, the owner of the vessel is estopped by the policy of the law from denying what he has signed his name to and set afloat in the public market. However this may be, the plaintiff's counsel rest their case on the doctrine of agency, holding that defendant is absolutely responsible for the false representations of his agent in the bill of lading.

But if we can suppose there was testimony from which the jury might have inferred either mistake or bad faith on the part of Cobb & Co., we are of opinion that Vinton, the ship owner, is not liable for the false statement in the bill of lading, because the transaction was not within the scope of their authority.

If we look to the evidence of the extent of their authority, as found in the bill of exceptions, it is this short sentence:

"During the month of December, 1873" (the date of the bill of lading), the firm of E. D. Cobb & Co., of Memphis, Tennessee, were authorized agents of the defendant at Memphis, with power to solicit freights and to execute and deliver to shippers bills of lading for freight shipped on defendant's steamboat, Ben Franklin."

This authority to execute and deliver bills of lading has two limitations, namely: They could only be delivered to shippers, and they could only be delivered for freight shipped on the steamboat.

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they came within the control and custody of the officers of the boat for the purpose of shipment, the contract had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendants had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

Such is not only the necessary inference from the definition of the authority under which they acted, as found in the bill of exceptions, but such would be the legal implication if their relation to defendant had been stated in more general terms. The result would have been the same if it had been merely stated that they were the shipping agents of the owner of the vessel at that point.

It appears to us that this proposition was distinctly adjudged by this court in the case of The Schooner Freeman v. Buckingham. 18 How. 182. In that case the schooner was libelled in admiralty for failing to deliver flour for which the master had given two bills of lading, certifying that it had been delivered on board the vessel at Cleveland, to be carried to Buffalo and safely delivered. The libellants, who resided in the city of New York, had advanced money to the consignee on these bills of lading, which were delivered to them. It turned out that no such flour had ever been shipped, and that the master had been induced, by the fraudulent orders of a person in control of the vessel at the time, to make and deliver the bills of lading to him, and that he had sold the drafts on which libellants had paid the money and received the bills of lading in good faith.

A question arose how far the claimant, who was the real owner, or general owner of the vessel, could be bound by the acts of the master appointed by one to whom he had confided the control of the vessel, and the court held that, having consented to this delivery of the vessel, he was bound by all the acts by which a master could lawfuly bind a vessel or its owner.

The court, in further discussing the question, says: "Even if the master had been appointed by the claimant, a wilful fraud committed by him on third persons by signing false bills of lading would not be within his agency. If the signer of a bill of lading was not the master of a vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner. But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more apparent authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in one case more than in the other; and his act in either case does not bind the owner even in favor of an innocent purchaser, if the facts on which his power depended did not exist; and it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which authority depends."

And the court cites as settling the law in this way in England, the cases of Grant v. Norway, 2 Eng. L. & Eq. 337; Hubbarts v. Ward, 18

Ib. 551; and Coleman v. Riches, 29 Ib. 323. Also Walter v. Bruner, 11 Mass. 99. See, also, McLean v. Fleming, L. R., 2 H., L. 128; Maclachan's Law of Merchant Shipping, 368-9.

It seems clear that the authority of E. D. Cobb & Co., as shipping agents, can not be greater than that of the master of a vessel transacting business by his ship in all the ports of the world.

And we are unable to see why this case is not conclusive of the one before us, unless we are prepared to overrule it squarely. The very question of the power of the agent to bind the owner by a bill of lading for goods never received, and of the effect of such a bill of lading as to innocent purchasers without notice, were discussed and were properly in the case, and were decided adversely to the principles on which plaintiffs' counsel insist in this case. Numerous other cases are cited in the brief of counsel in support of these views, but we deem it unnecessary to give them more special notice.

The case of the New York, etc. R. Co. v. Schuyler, 34 N. Y. 65, is much relied on by counsel as opposed to this principle.

Whatever may be the true rule which characterizes actions of officers of a corporation who are placed in control as the governing force of the corporation, which actions are at once a fraud on the corporation and the parties with whom they deal, and how far courts may yet decide to hold the corporations liable for such exercise of power by their officers, they can have no controlling influence over cases like the present. In the one before us it is a question of pure agency, and depends solely on the power confided to the agent.

In the other case the officer is the corporation for many purposes. Certainly a corporation can be charged with no intelligent action, or with entertaining any purpose, or committing any fraud, except as this intelligence, this purpose, this fraud is evidenced by the actions of its officers. And while it may be conceded that for many purposes they are agents, and are to be treated as the agents of the corporation or of the corporators, it is also true, that for some purposes they are the corporation, and their acts as such officers are its acts.

We do not think the case of the Railroad Co. v. Schuyler presents a rule for this case.

The judgment of the circuit court is affirmed

COMMON CARRIER—CONTRACT LIMITING LIABILITY—"LIVE-STOCK CONTRACT."

BRYANT v. SOUTHWESTERN R. CO.

Supreme Court of Georgia, March 7, 1882.

Where the shippers of live-stock over a railroad entered into an agreement with the railroad company, whereby it was stipulated and agreed that the carrier should not be responsible for injury to the stock in consequence of a failure or neglect to water or feed them while in transit, and the carrier negligently carried them beyond the destination to which they were shipped, in consequence of which they were deprived of the attentions of the shippers and their agents, and were without food or water during two days, *held*, the carrier was liable for damages occasioned to the stock thereby.

CRAWFORD, J., delivered the opinion of the court:

Bryant and Sockett sued the Southwestern R. Co. to recover damages for losses sustained upon a car load of mules shipped from Atlanta to them at Americus. The allegations upon which they relied for a recovery were: That the mules were delivered and received in good order by said railroad company at Macon, to be delivered in like good order to Sockett at Americus, on the 22d day of January, 1881; but by the careless and negligent conduct of its agents and employees, said car load of mules was sent to Dawson, forty miles beyond Americus, and there kept for three or four days without attention, to their injury $500. The jury returned a verdict for the defendant, which plaintiff moved to set aside, but the motion was overruled, and they excepted.

The evidence material to a decision of the questions made by this bill of exceptions is, that the mules belonging to the plaintiffs were shipped in a car "billed" to Dawson, and consigned to one Thornton, whilst Thornton's mules were consigned to the plaintiffs at Americus. Thus the plaintiffs' mules were carried beyond their destination, were shipped to Dawson, and remained in the car from the time on Sunday, when they should have been unloaded, until Tuesday at twelve o'clock, without attention water or food. They were so damaged by the confinement and inattention that some of them were almost wholly lost, and the rest were injured $20 a head. Other proof of losses were also introduced.

The defendant introduced in evidence a "live-stock contract," by which it was agreed that the shipper should release the railroad company from liability from all injury, loss or damage, from the character of the freight, and from all other damages which shall not have been caused by the fraud or gross negligence of the company. Other stipulations were incorporated, but nothing material to be added which affects the rights of the parties after the mules were carried beyond the place of delivery.

It further appears that the mules were taken out of the car at Macon *en route*, watered and fed, and then reloaded, and received by the defendant. No evidence was submitted controverting the facts that they were carried to Dawson; that they were without water, food or change from the time they were received on Sunday at Macon until delivered at Americus on Tuesday at twelve o'clock, or that the losses set up were not true.

The judge charged the jury as follows: "In the contract between plaintiff and the Central Railroad Company, it is especially stipulated that they, nor the road receiving that property

from them, shall not be liable for any attention, feeding, or watering the stock, but that they should offer reasonable facilities to the shipper or person in charge of the stock. The railroad company merely undertook to offer, or afford, them facilities for feeding and watering the stock, not to feed and water them itself. It was stipulated that the shipper should not hold the railroad company responsible for any delay occurring in the delivery of the property, but that the shipper should attend to the stock, and feed them and water them. Therefore the Southwestern R. Co. is not liable for any injury that occurred to those mules for want of being fed and watered, for people are bound by their contracts, by the contracts which they may make."

"If you should believe from the evidence that Sockett's car load of mules was, by mistake of a person in Atlanta, connected with the Central R. Co., shipped to a person in Dawson, and not to Sockett in Americus, and that the Southwestern R. Co. received these mules in Macon so consigned to a person in Dawson, and carried them to Dawson, and that, whatever damage they sustained occurred at that point by reason of their being shipped to that point, and not being fed and watered there, why, then, in my judgment, the Southwestern R. Co. is not liable for such damages."

The first paragraph of the foregoing charge would be correct if the railroad company had carried out its contract by a delivery of the mules at Americus, as it agreed to do, and had not shipped them beyond. The plaintiff's contract extended to the attention, feeding and watering the mules only to the place of their destination; and had the delay occurred, and the damage been sustained before reaching it, just as it did afterwards, then the plaintiffs could not have recovered. He had the right to expect, according to his contract, that his mules would be delivered at the place of their consignment, and, therefore, was not bound to follow them to Dawson, and feed, and water, and care for them there.

The judge truly stated the law in instructing the jury that people were bound by their contracts, and on construction of this contract that the Central Railroad and its connecting lines were to transport this live stock to Americus and no further; if they did, and damage accrued to the owner thereby, they were liable to respond.

The objection to the second paragraph of the foregoing charge is, that it relieved and discharged the Southwestern R. Co. from liability on the contract agreed upon by the Central Railroad for itself and the Southwestern to transport and deliver to the owners at Americus this car load of mules, and which it undertook to execute but failed to perform; and, although a mistake at Atlanta may have been made by an agent of the Central Railroad in shipping these mules improperly, yet such mistake would not relieve the defendant from liability under the facts as shown by the record in this case. It was a party to the contract. When, therefore, it broke its contract by passing Americus and carrying to Dawson the plaintiffs' mules, they were entitled to recover for such breach of the contract, and for all damages consequent thereon, whether the same resulted from the failure to feed or water the mules, or to make sale of them, or any other cause flowing directly therefrom.

Another assignment of error arises on the failure of the judge to charge: "That if the defendant had the mules in its possession, and while in its possession they were injured by the gross negligence of the agents and employees of said company in not feeding and watering them, then the defendant would be liable to the owners for such damage."

The plaintiffs were not entitled to this charge, as the gross negligence was confined to the watering and feeding generally, and not to the time whilst they were beyond Americus. Plaintiffs themselves were required to give this attention to Americus; but when they were shipped beyond that point, they had not undertaken to follow them wheresoever the company might carry them and continue such attention. If, then, after thus breaking the contract, they were damaged by such neglect, the defendant would be liable, and the plaintiffs were entitled to such charge so limited, but not so general as claimed.

Judgment reversed.

NEGLIGENCE — PUBLIC RECORD—ERROR — LIABILITY OF CLERK AND SURETIES.

CREWS v. TAYLOR.

Supreme Court of Texas.

Where a deed contained a recital that it was made in consideration of a sum paid and a further sum secured, and was put upon record on the day it was made, and a mortgage was made at the same time by the grantee in the deed to secure the purchase money, and was filed for record, but through the negligence of the clerk was not recorded, a subsequent mortgagee will be charged with notice of the existence of such incumbrance so as to bar his action against the clerk for a failure to put the mortgage on record.

Appeal from the Harris County District Court.

This suit was instituted by appellant, Crews, against Taylor and the sureties on his official bond as clerk of the district court of Harris County, on March 20, 1873, to recover $1,249.46 and interest, as damages, resulting to appellant on account of the negligence of Taylor as such clerk. The case, as presented by the record, is in substance this: On the 16th day of May, 1870, Richardson purchased of Bucholtz the land described in the petition, for $1,500, paid $500 cash, and gave his note for $1,000; the deed recited that "in consideration of the sum of fifteed hundred gold dollars to me paid and secured by Joseph A. Richardson." A mortgage was executed at the same time by

Richardson to Bucholtz on the land to secure the note. The deed and mortgage were both acknowledged and deposited in Taylor's office on said 16th day of May, 1870, and the recording fees were then paid, and the deed was recorded on the same day. The clerk did not keep a file book, but the mortgage was filed the same day, but was not recorded until after the 20th of July, 1870; that on the last named date, Richardson applied to Crews for a loan of $6,000, proposing to secure the same by a deed of trust on the land. Crews had his attorney to examine the records of Harris County; the deed from Bucholtz to Richardson was seen and examined by the attorney, but the mortgage was not seen, and no inquiry was made by the attorney for any file book or for instruments filed, but not recorded; upon the advice of the attorney the loan was made and the deed of trust was taken. Subsequently Bucholtz brought suit on the note and mortgage, and obtained judgment for the amount and a decree foreclosing his lien; Crews, to protect himself, was forced to pay off the amount of that judgment.

The defense was that the record gave full notice of Bucholtz's claim, contributory negligence upon the part of Crews, and that the property purchased by appellant under his deed of trust was of greater value than both notes, etc.

The case was tried April 23, 1874, and resulted in a verdict and judgment in favor of the defendants, from which this appeal was taken. In the view we take of the case, the errors assigned need not be specifically noticed.

W. H. Crank, and *Baker & Botts*, for appellant; *E. P. Hill* and *F. A. Schaefer*, for appellees.

A. T. WATTS, Commissioner of Appeals, delivered the opinion:

When the mortgage from Richardson to Bucholtz was acknowledged and filed with the clerk for record, the statute required him to enter the same in a file book, to be provided for that purpose. Paschal's Digest, art. 5012. Also the clerk was required, without delay, to record the same in the order as to time when it was deposited with him. Paschal's Digest, art. 5013. As shown by the evidence, the mortgage was acknowledged and filed with the clerk May 16, 1870, there was no file book kept in the office, nor was the mortgage entered of record July 20, 1870, when the appellant made the loan to Richardson and accepted the trust deed to Phillips upon the land to secure the same.

It is claimed by appellant that he was damaged by reason of this negligence upon the part of the clerk, in the sum of $1,249, and brings this suit upon his official bond to recover such damages.

The position that article 5018 of Paschal's Digest gives a right of action, to any person injured by the negligence of the clerk in the particulars mentioned, is not sound. The language conferring the rights is as follows: "And shall also be liable to the party for all damages he may have sustained thereby, to be recovered by suit on the official bond of such recorder, given by him as clerk of the county court, against such clerk and his sureties." From a consideration of this clause, together with the entire article, the undoubted intention was to confer the right of action upon the party who was interested in, and who had a right to have the instrument recorded, and that it was not intended thereby to extend that right to third parties who might be injured by reason of the negligence of the clerk.

As to such third parties who might be damaged by reason of the negligence of the clerk as such, a right of action exists upon the general principles of law, independent of statute. Besides, it would seem that a right of action upon the official bond of the clerk was given by statute, to any person injured by the breach of the same. Paschals' Digest, arts. 500 and 1240. Undoubtedly, if the clerk was negligent in the discharge of his official duties, and appellant, without fault upon his part, was injured thereby, then he would have a right of action upon the official bond for the damages sustained by such negligence.

The gist of the action here is, that the clerk failed to enter the mortgage upon a file book, and also failed to spread the same upon the record and note it in the index; that, by reason of this negligence, appellant, after examining the records, failed to find any such mortgage, and was thereby misled and induced to believe that Richardson's title to the property was good, and that the same was free from encumbrances. That, being thus deceived, he made the loan to Richardson, relying upon the land, but to protect himself he was afterwards compelled to pay off the Bucholtz debt, the amount of which, with interest, he seeks to recover with damages.

Now, if the mortgage had been spread upon the record, and had been seen by the attorney of the appellant, it would have given him notice, actual and constructive, of the fact that a portion of the purchase money for the land was unpaid by Richardson, and that it constituted a lien thereon. That actual and constructive notice of a fact is equivalent each with the other, and that one receives no additional force or strength by reason of the existence of the other, are propositions of law that will not admit of question.

As a matter of law, the depositing of the mortgage with the clerk for record, from that time constituted constructive notice of its contents to all persons; and if, by reason of the negligence of the clerk in the particulars complained of, appellant was deprived of the information of the fact that such mortgage had been deposited with him for record, then ordinarily appellant would be entitled to recover of the clerk and his sureties the damages resulting from such negligence, unless it appears that the appellant was otherwise legally chargeable with a knowledge of the existence of the adverse claim and lien.

It is admitted that the deed from Buckholtz to Richardson was on record at the time appellant's attorney made the examination, and that he as a matter of fact saw and examined the same. That

deed recited that it was made "in consideration of the sum of fifteen hundred gold dollars to me paid and secured by Joseph A. Richardson." This record, as a matter of law, gave notice to appellant that a portion of the purchase money was unpaid, and that *prima facie* the vendor's lien existed upon the land in behalf of Buckholtz. Willis v. Gay, 48 Tex. 469; Ellis v. Singletary, 45 Tex. 27; Robertson v. Guerin, 50 Tex. 323.

Admitting that the law charged appellant with notice of such fact, by reason of the registration of this deed, then it simply follows that the record of the mortgage would have given notice of the same facts, which, in contemplation of the law, he then had; that is, that Richardson owed Buchholtz part of the purchase money for the land, and that it constituted a lien on the land, superior to any that he might obtain from Richardson.

In contemplation of the law he knew these facts at the time he made the loan to Richardson; hence it would follow that whatever injury he sustained in that particular is chargeable to his own fault, and not to the negligence of the clerk. But if we should concede that the law is otherwise than is shown by the evidence, the mortgage was deposited with the clerk for record, from thence constructive notice of the same results just as though it had been spread upon the record. When the attorney of plaintiff went to the clerk's office to examine with reference to Richardson's title, he did not inquire of the clerk for the file book, nor for instruments filed and not recorded; nor does it appear that the clerk knew that he was making an examination with reference to that land, but the attorney contented himself with simply examining the record and indexes. The record of the deed gave him notice of the existence of Buckholtz's claim, and the evidence shows that the latter lived but a short distance from the court house, also that an inquiry of him would have resulted in full information respecting the whole matter. Now admitting that the clerk might have acted negligently in failing to record the mortgage, still it must be conceded that appellant was equally negligent in failing to inquire of the clerk for instruments filed and not recorded, and also in failing to make inquiry of Buckholtz, who is shown to have resided in the same city.

It may be stated as a general rule that when the parties are both guilty of negligence, that neither can recover of the other damages resulting from such negligence. That is, if the negligence of a party materially contributed to an injury, then he can not recover of others on the ground of this negligence. Sherman & Redfield on Negligence, sec. 32 and notes; Field on the Law of Damages, sec. 171. From the evidence in this case it clearly appears that the negligence of appellant, if not the prime cause of the injury, certainly materially contributed to it. The supposed errors in the rulings and charges of the court, in regard to the validity of the land, in the view we take of the case, must be considered as immaterial, and could not vary the result.

The judgment ought to be affirmed.

Report of Commissioners of Appeals examined, their opinion adopted, and the judgment affirmed.

(Signed) ROBERT S. GOULD, C. J.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In your issue of 17th of February last there appeared an article on "Digesting and Indexing," which presents views claimed by the author to be the best and most convenient to answer the purpose for which that kind of work is designed. In your editorial you invite criticism and comment thereon, and we avail ourselves of that invitation to state what we know and have learned upon that subject.

We have been engaged for two years past in preparing, and are now having printed, an index-digest of South Carolina Supreme Court Reports (about 100 volumes), somewhat after the style of Myer's Index, U. S. Supreme Court Reports. The work has been very laborious, and we have carefully considered every plan by which when completed the desired end could be best accomplished.

We conceive that there are two essentials to a book of this character: 1. That it should be well condensed. 2. That it should be easy of reference, and thereby labor saving. We found all such books, made with a system of sub-heads and cross-references, which were constantly carrying the examiner from one part of the book to another in a long and tiresome search for what he desired to find. For instance—one wishes to find a decision upon a question, whether parol evidence would be admissible to prove a particular fact. With the digests, as heretofore printed, he would look for Evidence as the head. Under that he would find as a sub-head, Evidence—Parol; then, probably, admissible when, inadmissible when, no paging would appear after the subdivisions and to find what he was after, the examiner must turn over page after page. This is the system in which the noun is used as the primary idea, and after careful consideration we decided not to follow it, but to adopt the following: We have no sub-heads: each subject and sub-division speaks for itself, in its own place alphabetically, and also lexicographically. For instance: "Parol Evidence" will be found so stated in letter "P," and not as Evidence—Parol, in letter "E;" "Measure of Damages" under "M," and not letter "D;" "Arrest of Judgments" under letter "A," and not under letter "J." The matter is repeated under as many heads as there are "catch words" in the sentences; for instance, the following: "Recital in deed, of sheriff's authority to sell, estops, him," would be found under "Deed,"

"Estoppel," "Sheriff's Sale," and "Recitals," thus speedily insuring one's search, as there is often diversity of opinion as to which is the prominent word in the sentence, requiring often several references before the matter is found. The above plan we think remedies this evil. The matter under each head is also chronologically arranged. thus dispensing with the necessity of a table of affirmed and overruled cases. The examiner has merely to follow out any given subject to ascertain the changes in, or conformation of, the law. The references contain the names of cases, as well as the volume and page. It being an index-digest is also a great advantage, as it contains the good points to be found in an index and digest, without the disadvantages of either separately. In a digest, the syllabus of the case is embodied intact, often being cumbered with long statement of facts, rendering the points decided obscure.

In an index, generally, there is no matter at all, simply the headings, under which is the book and page. The index-digest gives only the points decided, or leads thereto, combining brevity with clearness. The advantages of this system we hope will be readily apparent to all, at any rate it may be the means of some one suggesting a better plan.

J. BACHMAN CHISOLM,
SIMEON HYDE, JR.

Charleston, S. C.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

48. An officer attached personal property as the property of A. The property was receipted, B and C signing the receipt, and the property given into their hands. Judgment was obtained against A, and execution issued. The attaching officer having the execution demanded the property of the receiptmen B and C, who delivered it, and the officer sold it in part satisfaction of the execution. B, one of the receiptmen, then brought replevin against the purchaser at execution sale, claiming that he had purchased the property of A before the attachment, and made A his agent to hold and use it till he called for it. Was a demand necessary before replevin brought? H.

Boston, Mass.

49. A sells to B his stock in trade and the good will of the business, and stipulates in writing with B never to engage in like business within twenty-five miles of Columbus. Afterwards B sells out to C, and assigns to him the aforesaid stipulation of A. Can C restrain A from engaging in like business? Is such a stipulation assignable? A. F. M.

Columbus, Ohio.

50. A executed and delivered to C a mortgage on real estate situated in Massachusetts. Subsequently A's right, title and interest or right of redeeming said mortgaged real estate was attached by a creditor of A and sold on execution, the creditor purchasing the same, who notified the tenant that he had purchased A's right, title and interest or right of redeeming said mortgaged real estate, and all rents accruing after that time must be paid to him. Subsequently C, the mortgagee, entered upon the premises for the purpose of collecting the rents and profits, and notified the tenant that he held said mortgage, that the condition thereof had been broken, and all rent which might have accrued thereafter must be paid to him; to which the tenant made no answer, but continued to occupy said premises for a long time, and refused to pay C, the mortgagee, for the use and occupation of he same, claiming to be a tenant of the creditor, to whom he paid the rent. Can C, the mortgagee, maintain an action against the tenant for the use and occupation after said notice? M.

Worcester, Mass.

51. A, the owner of certain real estate, leaves his home and is unheard of for more than seven years. B applies for and obtains letters of administration, which were granted by the court, upon the presumption of A's death. B, the administrator, under the direction of the court, sells the real estate of which A was seized to C, and executes to him a deed, and distributees the proceeds of the sale among the distributes of A, and is discharged by order of the court. Subsequent to the proceeding A returns to his home. Can A maintain an action in ejectment against C and recover his land? If A can recover, what remedy has C? C. D. P.

Washington, D. C.

52. A purchased a building lot in city. Previous to said purchase B, C and D, and perhaps other creditors, had judgments pending in the circuit court in same county and State (Ind.), in which said building lot was situated. E buys said lot of A, paying cash, and erects dwelling at considerable expense thereon before he learns of said liens. Now, as A has no property, what recourse has E to save his premises? Do said liens hold the property for the value at the time E purchased, or do they stand against the buildings and lot also? The liens are larger than the value of lot, less building. Would a schedule of A avail E, as A has less property than the exemption laws of Indiana give him? P.

Vincennes, Ind.

QUERIES ANSWERED.

Query 38. [14 Cent. L. J. 318.] A person, walking on the public sidewalk in a city, is struck by snow falling from the roof of a building owned by the city, and used for municipal purposes. Can the injured man recover? E. B. G.

Worcester, Mass.

Answer. It seems to be the settled law in Massachusetts that for the neglect of a public duty an indictment can be maintained against a *quasi* corporation, but not a civil action, unless the action be given by statute. Mower v. Leicester, 9 Mass. 247, 250; 122 Mass. 344. This is also true of the law of England. Russell v. Men of Devere, 2 T. R. 667, 673; Thomas v. Lerrell, Vaughn. 330, 640, and of most of the States in this country; Adams v. Wiscasset Bank, 1 Greenl. 361, 364; Reed v. Belfast, 20 Me. 246, 248; Bartlett v. Crozier, 17 Johns. 439. There is a distinction drawn between acts done by a city in discharge of a public duty and acts done for its private advantage. Scott v.

Mayor of Manchester, 2 N. & N. 204; Bailey v. Mayor of New York, 3 Hill, 534. J. F. N.
Pittsfield, Mass.

Query 43. [14 Cent. L. J. 337.] A deedfor the conveyance of real estate is properly acknowledged by grantor and grantee before a notary public. Parties to the contract agree that notary, before delivering deed to grantee, shall except two and one-quarter acres of land therein described. Notary never makes the correction. After death of grantor the deed is properly recorded. A stranger purchases the land from the original grantee. Can he hold possession of the land, or is the delivery to the notary an escrow, the conditions of which have never been complied with, and will that leave the title still in the heirs of the original grantor?" F. H.
Keokuk, Iowa.

Answer. He can hold possession of the land. The delivery is not an escrow. To determine whether or not an instrument is an escrow, the question is not merely whether the instrument was delivered to a third person to be held conditionally, but whether the delivery was of a character negativing its being a delivery to the party who was to have the benefit of the instrument. Watkins v. Nash, 44 L. J. Chanc. 505; 20 L. R. Eq. 262; 23 W. R. 647, V. C. H. In this case the grantee signed it, sealed it, had it properly acknowledged and declared in the presence of the grantee, notary and attesting witnesses, that the property should pass to the grantee, but the notary should "except two and one-quarter acres of land therein described." This delivery was not of such "character negativing its being a delivery" to the grantee; therefore not an escrow. See above cited case. The title does not remain in the heirs of the original grantor, for it passed to the grantee when deed was acknowledged by notary. E. M.
Keokuk, Iowa.

Query 46. [14 Cent. L. J. 338.] A is a teacher in a public school; B is a pupil of A. B becomes pregnant and charges A with being the father of the child; and A is arrested under the Bastardy Act, and to settle, or at least while the bastardy proceedings are pending, A marries B, but never lives with her as husband and wife. After marriage A is indicted under the following statute of Ohio, sec. 7024: "A male person over 21 years of age, who is superintendent, tutor or teacher in a private or public school, * * * * who has sexual intercourse at any time or place, with any female, with her consent, while under his instruction, during the term of his engagement as tutor, etc., shall be imprisoned, etc." Upon the trial of A upon that indictment, can B, she still being the wife of A, testify? Is she a competent witness of the acts of A and to the fact of intercourse which took place before the marriage and while she is a *feme sole* and a pupil? The common law being in force in Ohio in criminal cases. See Steen v. Ohio, 20 Ohio St. 333; and Whipp v. State, 34 Ohio St., 88. E.
Jefferson, Ohio.

Answer. If the common law is in force in Ohio as to competency of witnesses in criminal cases, then the wife of B would not be permitted to testify in the case you narrate. 1 Greel. on Ev., secs. 334, 335, 336, and the many cases there cited. The rule would not be different if A and B were now divorced. Stein v. Bowman, 13 Pet. 209. The fact of the crime having been committed before the marriage makes no difference in the application of the rule, as will be seen by reference to the above cited authorities.
Chicago, Ill. M. I. Beck.

WEEKLY DIGEST OF RECENT CASES.

AGENCY—CONTRACT — FRAUD OF AGEBT— NEGLIGENCE.

L B W having contracted verbally with H, the agent of C, B & H, to furnish and put up certain lightning rods, at a cost not to exceed $100, H afterwards presented to him a paper for his signature, which he said was an order to the house to put up the work. L B W, not being able to read well without spectacles, and having none at hand, requested H to read the paper (several clerks of W being in the same store with W and H at the time). H read, or pretended to read, the paper, but did not read anything about the price to be paid for the rods, whereupon L B W put his signature to it. It turned out that the paper contained a stipulation on the part of L B W to pay for the rods at the rate of 37 1-2 cents per foot, and that at that rate the rods furnished amounted to $404.25. In a suit between the parties, *held*, that L B W was not guilty of such negligence, or want of diligence, as would enable C, B and H to recover on the written instrument. *Cole v. Williams*, S. C. Neb., April 5, 1882.

AGENCY—SPECIAL AUTHORITY—LIMITS OF.

Where an agent with only special authority to sell a tract of land for a fixed price, in case he could sell it immediately, answered by letter that he could not sell it for that price, and requested permission to sell for considerably less, or, if that were not given, to let the matter drop, and afterwards, without any further communication with the owner of the land, sold it for the price at which it was first offered, *held*, that the sale was unauthorized, and not binding upon the principal. *Mathews v. Sowle*, S. C. Neb. April 4, 1882.

CONTRACT—INTERPRETATION — FAILURE OF SUBJECT MATTER.

A, by an agreement in writing, "leased" to B "all the clay that is good No. 1 fire clay, on his land," described, for a term of three years, subject to the conditions that B "shall mine, or cause to be mined, or pay for, not less than 2,000 tons of clay every year, and shall pay therefor, twenty-five cents per ton for every ton of clay monthly, as it is taken away." *Held*, 1. That this was a contract which gave B the exclusive right to mine and remove all the good No. 1 fire clay that was on the land, and not a lease of the land itself. 2. If clay of that quality, and in quantity sufficient to justify its being mined existed, B, on failure to mine at least 2,000 tons per year, each year while the contract was in force, was bound to pay for that amount at the agreed price per ton. 3. But if, in fact, clay of that quality and quantity sufficient to justify its being mined could not, by the use of due diligence be found on the land, then there was no obligation to pay the amount agreed on in case of failure to mine. *Scioto Fire Brick Co. v. Pond*, S. C. Ohio, April 18, 1882.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—LABOR DEBTS.

A contract entered into with a corporation by the terms of which the party agreed for one year, afterwards extended for five years, to take out and deliver the plaster rock from the quarry of the company, for which he was to receive pay at the rate of sixty cents a ton, to be estimated by measurement, monthly, ten per cent. of the amount due to be reserved by the company as security, can not properly be treated as a labor performance

for the corporation, in the meaning of the Constitution and statutes declaring stockholders liable for labor debts. *Taylor v. Manwaring*, S. C. Mich., April 19, 1882.

DAMAGES — BREACH OF CONTRACT — MEASURE OF DAMAGES.

Plaintiff contracted with defendant to furnish the materials and make for defendant two boilers, and have the same completed, and all connected in the mill of the first party, on or before the 15th day of March, 1880. They were not completed until the 28th day of April. The boilers were to be used in the steam-mill and salt block of the defendant, which was known to plaintiff. Upon suit brought for a balance due upon the contract defendant set up as recoupment the loss of profits from inability to use the salt block between March 18th and April 28th. *Held*, that the same was properly disallowed. *McEwen v. McKinnon*, S. C. Mich., April 12, 1882.

EQUITY—LANDS PURCHASED WITH FUNDS OF ESTATE—TITLE IN NAME OF EXECUTRIX.

Where an executrix purchased lands with the funds of the estate, and took the title in her own name, with *habendum* to herself, her heirs and assigns, but describing herself as executrix: *Held*, that a judgment creditor of such executrix levying upon such lands, and making sale under his execution, acquired no title thereto as against the heirs of the estate. Notice of *lis pendens* filed in a former partition suit, *held* sufficient to bind parties as to the land in question. *Atterauge v. Christiansen*, S. C. Mich., April 12, 1882.

FRAUDULENT CONVEYANCE—IMMORAL CONSIDERATION.

The purchase of property by a man, for a woman, in his own name, and its conveyance to her without any pecuniary consideration, and in view of illicit intercourse with her, past and expected, will not be sustained as against the claims of creditors for debts owing at the time of the grant, which he at that time was unable to pay. *Jackson v. Miner*, S. C. Ill., March Term, 1882.

HOMESTEAD—ABANDONMENT—LEASE OF PREMISES.

D was the owner of a homestead consisting of two lots, in the City of O, on which were situated the dwelling-house and a large horse barn. A judgment was rendered and docketed against D, October 28, 1874. In 1876, D left home and the State for temporary purposes, intending to return, leaving his wife and family occupying the homestead. Mrs. D leased the barn to a tenant for the term of one year, reserving certain privileges. Execution issued and levied upon so much of the ground as was covered by the barn. On claim of exemption and injunction: *Held*, that such leasing of the barn, and its use by the tenant, was not inconsistent with the occupancy of the homestead by the debtor, and a decree making the injunction against the sale on execution perpetual, affirmed. *Guy v. Downs*, S. C. Neb., April 5, 1882.

INSOLVENCY — COMPOSITION — AGREEMENT — FRAUD.

A compromise by a debtor with his creditors, by which he paid fifty cents on the dollar of his indebtedness, and procured releases, will not be set aside, in the absence of proof of any false representations or fraud except his omission to inform his creditors that he had held the title to certain houses and lots, and had made a gift of them to another. *Jackson v. Miner*, S. C. Ill., March Term, 1882.

INSOLVENCY—WHAT IS AN ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSIGNMENT BY ONE PARTNER TO ANOTHER OF FIRM ASSETS.

Where one partner transfers and delivers to another all the assets of the firm, to collect the debts due the firm and pay and discharge its liabilities, giving suh managing partner all the powers possessed by both, for the purpose of settling the partnership affairs and a division of the proceeds after payment of the debts, this is not an assignment for the benefit of creditors of the firm, but one for the benefit of the parties, and will not prevent the partner taking the assignment from securing one creditor to the prejudice of others. *Smith v. Dennison*, S. C. Ill., March Term, 1882.

NATIONAL BANKS—"SHAREHOLDER"—RESPONSIBILITY FOR DEBTS OF BANK.

While it may be true that a bank organized under the National Banking law may not be bound to admit a purchaser of shares of stock in the association to all the rights and liabilities of the prior holder, unless the transfer is made on the books of the bank in the manner prescribed by the by-laws or articles of association, yet where it does issue certificates of shares to a subsequent purchaser in lieu of the certificates of the prior owner, without observing its by-laws, so far as creditors of the bank are concerned, a party taking and holding such shares of stock will be subject to the liabilities imposed by section 5151 of the National Banking law. *Laing v. Burley*, S. C. Ill., March Term, 1882.

NEGOTIABLE PAPER — INNOCENT HOLDER FOR VALUE.

A bank purchased secured and unsecured notes, before the maturity thereof, for about three-fifths of their face value. In an action on one of the notes, there being no testimony to show their actual value, *held*, that this was not sufficient to justify a jury in finding that the bank was not a *bona fide* purchaser. *Citizens's Bank v. Ryman*, S. C. Neb., April 4, 1882.

NEGOTIABLE PAPER—WHAT CONSTITUTES A NEGOTIABLE NOTE.

A note in the following terms—"On or before four years from date hereof for value received I promise to pay to John T. Elliott or order $1,532.90, with interest on the same at the rate of 10 per cent. per annum; interest not to be paid annually unless the said Beckwith can make it convenient, and other security to be taken in exchange for this note when said Beckwith can realize the same in proper shape from the Mary A. Chubb homestead. This note is secured by a real estate mortgage bearing even date herewith"—is not a negotiable instrument. *Humphrey v. Beckwith*, S. C. Mich., April 19, 1882.

NEGLIGENCE—RAILROAD CROSSING — EVIDENCE—PURE ACCIDENT.

A driver of a horse and buggy at night within the limits of a city, paused a safe distance from a railroad crossing, looked and listened. Neither hearing nor seeing anything to indicate an approaching train, and seeing the lamp of the railroad watchman whose duty it was to give warning of danger by waving the light, hanging on the watchbox where it was wont to be when the track was clear, he drove on to within a few yards of the crossing, and there seeing an approaching train, and hearing the bell, paused again; as the train drew near, however, the horse became frightened, and dashed into the engine, killing itself and demolishing the buggy. In an action by the owner

of the horse and buggy against the railroad company to recover damages for his loss, alleged by him to have been caused by the negligence of the company defendant: *Held*, that there was no evidence of any negligence on the part of the company defendant which occasioned plaintiff's loss, but that the same was the result of a pure accident, the occurrence of which the exercise of no care on the part of the company defendant could have prevented, and that therefore a nonsuit was rightly awarded. *Miller v. Philadelphia, etc. R. Co.*, S. C. Pa., March 2, 1882.

PARTNERSHIP — PARTNER'S POWER IN SETTLING FIRM BUSINESS.

Where one partner intrusted with the winding up of the business of the firm was authorized, by agreement, to trade any part of the assets, and to do all and everything for settling its affairs that might be deemed expedient, it was *held*, that such partner was authorized, on borrowing money to pay a liability of the firm, to pledge notes of the firm as collaterals to secure not only the new indebtedness so created, but also a prior indebtedness of the firm to the same creditor. *Smith v. Dennison*, S. C. Ill., March Term, 1882.

PLEADING—DIVERSE CAUSES OF ACTION.

A petition in an action against A and B, who are husband and wife, and X, who holds a mortgage of land from B, to have a prior deed from A and B to plaintiff, absolute on its face, declared a mortgage and to have a subsequent recorded deed purporting to have been executed by plaintiff to B, conveying to her the same land, set aside as a forgery, and to have plaintiff's mortgage foreclosed against all the defendants, does not improperly unite different causes of action. *Moon v. McKnight*, S. C. Wis., March 14, 1882.

PRACTICE — REFEREE — TIME LIMITED WITHIN WHICH TO REPORT—JURISDICTION.

The right of a referee to proceed with the trial of issues referred to him by order of court does not extend beyond the time at which he is directed to make his report. *Robinson v. O'Connor*, S. C. Neb., April 4, 1882.

PRACTICE—SUIT ON INSTRUMENT PURPORTING TO BE SIGNED BY DEFENDANT—AFFIDAVIT TO PUT SIGNATURE IN ISSUE.

Where two parties are jointly sued on a promissory note purporting to have been executed by them, the affidavit of one of the parties denying the execution of the note is sufficient to put the execution and validity of the note in issue without requiring an affidavit of the other party to the note. *Wren v. McLaren*, S. C. Mich., April 19, 1882.

QUIETING TITLE—PLEADING—SCOPE OF PROCEEDING.

Where a bill in equity is filed by one in possession of lands, to establish and quiet the title thereto in himself, the fact that defendants may claim title through different sources, and by different instruments, will not prevent them being put in issue and determined in one proceeding, or render the bill multifarious. *Atterauge v. Christiansen*, S. C. Mich., April 12, 1882.

REPLEVIN—ACTION ON BOND—MEASURE OF DAMAGES.

In an action of replevin, where the property claimed had not been taken, and the action having proceeded as one for damages only, the jury found the right of property, and the right of possession of said property, when the action was commenced in the plaintiff, etc.: *Held*, that the measure of damages was the value of the property as proved, together with lawful interest thereon from the date of the unlawful taking thereof by the defendant to the first day of the term of the court at which the trial was had. *Hainer v. Lee*, S. C. Neb., April 5, 1882.

SURETY—ALTERATION IN CONTRACT—IMMATERIALITY.

By contract between G and plaintiff, G was to have the exclusive right in certain places to sell harrows bought of him by plaintiff, and was to pay plaintiff for harrows so purchased, either "by cash or note due July 1, 1879, with privilege of five months extension, if desired, with ten per cent. interest." B guaranteed payment by G for all purchases made by him under such contract, and payment of all notes "or renewals thereof" made by G in pursuance of the contract. Afterwards, by a written addition to the contract with G, made without the knowledge of B, plaintiff gave him the privilege of selling harrows at a certain other place named. G sold harrows at such other places and gave his note for the amount due plaintiff therefor, payable on or before November 1, 1879, with interest after July 1, 1879, at ten per cent. In a suit on such note: *Held*, 1. That the liability of B as surety was not affected by the additional agreement between G and plaintiff as to the place of sale. 2. That there is no material difference between the form of the note in suit, given by G, and that described in the contract, and the surety is liable thereon. *Fond du Lac Harrow Co. v. Bowles*, S. C. Wis., March 14, 1882.

TRUST—SPECIFIC TRUST—TRUSTEES DUTIES AND LIABILITIES.

Where real property was conveyed to a party to enable him to plat and sell the same, pay the encumbrances thereon, and a certain claim against the owner out of the proceeds thereof, the balance, if any, to be paid to the owner of the property, for which services such party was to receive ten per cent. on all sales made by him, it is a conveyance in trust for a specific purpose, and a party holding such claim against the owner of the property can not enforce in a court of equity the security given him by the trustee. *Humphrey v. Beckwith*, S. C. Mich., April 19, 1882.

TRUST — STRANGER TO FUND CHARGEABLE AS TRUSTEE—BANKING.

If a depositor pays his own debt to a banker by a check upon funds to his credit in a fiduciary capacity, the banker will be affected with knowledge of the unlawful character of the appropriation, and will be compelled to refund to the *cestui que trust*; but the debt paid must be such as that the officers of the bank are aware that the same is really and in truth the private debt of such depositor. *Fifth National Bank v. Hyde Park*, S. C. Ill., March Term, 1882.

WILL—DEVISAVIT VEL NON — EVIDENCE — UNDUE INFLUENCE.

Where, in an issue *devisavit vel non*, the testimony shows that the testator has perfectly understood the nature of his testamentary act and the disposition he is making of his property, no weight will be attached to subsequent loose declarations made by him to the effect that he has not made a will, and that he desires his property to pass to persons other than the legatees and devisees named in the will. *Irvin v. Deschamps*, S. C. Pa., January 13, 1882.